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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Esterlin Appolon,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.
14
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No. CV-18-00357-TUC-CKJ

ORDER

16 On April 28, 2021, Magistrate Judge Bruce Macdonald issued a Report and
17 Recommendation (“R&R”) recommending that the Court dismiss Esterlin Appolon’s Third
18 Amended § 2254 Petition. (Doc. 36) On June 11, 2021, Appolon filed his timely Objection
19 to R&R. (Doc. 43) On June 17, 2021, the State filed its Response to Petitioner Appolon’s
20 Objections to the Magistrate Judge’s Report and Recommendation (Doc. 44); and on
21 June 25, 2021, Appolon filed his Response to State’s Motion (Doc. 46), which the Court
22 interprets as an improper reply in support of Objection to R&R.¹ For the following reasons,
23 the Court adopts the R&R, dismisses Appolon’s Third Amended Petition, and instructs the
24 Clerk of Court to close this case.
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¹ “No replies shall be filed unless leave is granted from the District Judge.” (Doc. 36 at 29).

BACKGROUND²

Conviction

On April 27, 2015, Nick Brown was shot in the face. (Doc. 35-1 at 134) The shooting occurred on the front porch of Brown's residence. *Id.* Despite his wounds, Brown was conscious and able to communicate with responding officers who arrived at the scene shortly after the shooting. *Id.* Brown identified Appolon as the shooter. *Id.* at 134-35. Another witness also informed officers that she saw Appolon speaking with Brown outside his residence shortly before the shooting. *Id.* at 135. An arrest team was formed, and Appolon was arrested outside his residence on the north side of Tucson. *Id.* Appolon shot Brown because Brown owed him money. *State v. Appolon*, No. 2 CA-CR 2019-0222-PR, 2020 WL 1079183, at *1 (Ariz. Ct. App. Mar. 6, 2020).

On August 4, 2017, after two mistrials, Appolon was convicted by jury of two counts of aggravated assault in Pima County Superior Court. *Id.* After Appolon's conviction and prior to his sentencing, his attorney filed a motion to withdraw because he believed that Appolon had a colorable claim of ineffective assistance of counsel based on counsel's failure to watch body camera footage taken from a responding officer on the night of the shooting. *Id.* The trial court granted the motion as well as Appolon's request to proceed pro se, and appointed advisory counsel for his sentencing hearing. *Id.* On January 29, 2018, Appolon was sentenced to concurrent prison terms of 11.25 years. *Id.*

Post-Conviction Relief Petition

On May 30, 2019, Appolon filed a Petition for Post-Conviction Relief ("PCR Petition") with the Superior Court. (Doc. 35-1 at 74-82) In his PCR Petition, Appolon raised three grounds for post-conviction relief. *Id.* at 74. He argued that: (i) there was insufficient evidence to support the jury's guilty verdict on the aggravated assault charges; (ii) the trial court lacked jurisdiction to render judgment and impose a sentence; and (iii) the justice court lacked jurisdiction to conduct his initial appearance and hold him over for

² The Court adopts the thorough procedural history outlined in the Magistrate Judge's R&R. See Doc. 36 at 2-14.

1 proceedings in Superior Court. *Id.* at 74, 134.

2 On August 27, 2019, the court denied the PCR Petition, ruling that Appolon's justice
3 court jurisdictional challenge was without merit; jurisdictional challenges only applied to
4 a court's ability to render judgment or to impose a sentence; any Superior Court
5 jurisdictional challenge for a lack of probable cause for arrest could have been brought
6 prior to trial and was waived; Appolon made a knowing, intelligent and voluntary decision
7 to forego assistance of counsel and represent himself at the priors trial and at sentencing;
8 advisory counsel took an active role during post-trial hearings and spoke on Appolon's
9 behalf at sentencing; and Appolon failed to present clear and convincing evidence to
10 support the proposition that no reasonable factfinder would have been able to find him
11 guilty of two counts of aggravated assault beyond a reasonable doubt. *Id.* at 137-40.

12 Petition for Review

13 On September 18, 2019, Appolon filed a Petition for Review ("PFR") with the
14 Arizona Court of Appeals. (Doc. 35-1 at 152-164) In his PFR, Appolon raised five
15 arguments for review of the denial of his PCR Petition. *Id.* at 153. He argued that: (i) the
16 trial court abused its discretion by denying his PCR Petition; (ii) the justice court abused
17 its discretion by asserting jurisdiction over his initial appearance; (iii) the trial court abused
18 its discretion by rendering judgment and imposing a sentence; (iv) the prosecution failed
19 to present sufficient evidence to justify a rational trier of fact finding guilt beyond a
20 reasonable doubt for charges of aggravated assault; and (v) the trial court denied him fair
21 and impartial treatment in violation of the fundamental fairness doctrine. *Id.*

22 On March 6, 2020, the Arizona Court of Appeals granted Appolon's PFR and
23 denied relief. *Appolon*, 2020 WL 1079183, at *3. In its ruling, the Court of Appeals
24 concluded that any challenge to the justice court's jurisdiction was precluded because the
25 issue could have been raised during trial proceedings but had not; Appolon's claim that the
26 trial court lacked jurisdiction appeared to be based on his lack of counsel at sentencing,
27 and that Appolon knowingly, intelligently, and voluntarily waived his right to counsel; and
28 that a general challenge to the sufficiency of evidence presented at trial does not constitute

1 a viable claim. *Id.*

2 Third Amended Petition Under 28 U.S.C. § 2254

3 On May 26, 2020, Appolon filed his third amended Petition Under 28 U.S.C. § 2254
4 (“2254 Petition”). (Doc. 32) In his 2254 Petition, Appolon raised four grounds for relief,
5 arguing that: (i) the trial court failed to have jurisdiction to render judgment and impose a
6 sentence; (ii) there was insufficient evidence to justify a rational trier of fact finding guilt
7 beyond a reasonable doubt for aggravated assault charges; (iii) the trial court failed to have
8 subject matter jurisdiction over his criminal case; and (iv) the prosecution engaged in
9 misconduct by presenting body-camera evidence during his third trial, which it had not
10 produced during his first two trials. *Id.* at 6-11.

11 On April 28, 2021, Magistrate Judge Macdonald issued an R&R recommending that
12 the Court dismiss Appolon’s 2254 Petition, as all of his claims were procedurally defaulted.
13 (Doc. 36 at 28) The Magistrate Judge concluded that Article 6, Section 14 of the Arizona
14 Constitution invested state superior courts with original jurisdiction over felony and
15 misdemeanor criminal cases; Arizona Rule of Criminal Procedure 32.1 dictates that an
16 insufficiency of the evidence claim requires clear and convincing evidence, which Appolon
17 failed to produce; Arizona Revised Statute § 22-301(A)(2) confers jurisdiction upon the
18 state justice courts to conduct initial criminal appearances; Appolon failed to raise his claim
19 of prosecutorial misconduct to the Arizona courts; rulings on Appolon’s PCR Petition and
20 PFR were based upon independent and adequate state law grounds, which precluded habeas
21 review of identical claims by this Court; and Appolon failed to demonstrate cause and
22 prejudice as a result of his procedurally defaulted claims. *Id.* at 23-28.

23 **LEGAL STANDARD**

24 Report and Recommendation

25 A “district judge may refer dispositive pretrial motions, and petitions for writ of
26 habeas corpus, to a magistrate [judge], who shall conduct appropriate proceedings and
27 recommend dispositions.” *Thomas v. Arn*, 474 U.S. 140, 141 (1985); *see also* 28 U.S.C. §
28 636(b)(1)(B). Any party “may serve and file written objections” to a report and

1 recommendation by a magistrate judge. *Id.* § 636(b)(1). “A judge of the court shall make
 2 a *de novo* determination of those portions of the report or specified findings or
 3 recommendations to which objection is made.” *Id.* District courts, however, are not
 4 required to conduct “any review at all . . . of any issue that is not the subject of an
 5 objection.” *Arn*, 474 U.S. at 149. A district judge “may accept, reject, or modify, in whole
 6 or in part, the findings or recommendations made by the magistrate [judge].” 28 U.S.C. §
 7 636(b)(1).

8 Exhaustion Doctrine

9 “Before a federal court may grant habeas relief to a state prisoner, the prisoner must
 10 exhaust his remedies in state court.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S. Ct.
 11 1728, 1731, 144 L. Ed. 2d 1 (1999). To exhaust state remedies, a prisoner must afford the
 12 state courts the opportunity to rule upon the merits of his federal claims by fairly presenting
 13 them to the state’s highest court in a procedurally appropriate manner. *Baldwin v. Reese*,
 14 541 U.S. 27, 29 (2004). “[I]n Arizona, unless a prisoner has been sentenced to death, the
 15 highest court requirement is satisfied if the petitioner has presented his federal claim to the
 16 Arizona Court of Appeals either on direct appeal or in a petition for post-conviction relief.”
 17 *Date v. Schriro*, 619 F. Supp. 2d 736, 762 (D. Ariz. 2008) (quotation marks omitted).

18 A claim is fairly presented if the prisoner describes both the operative facts and the
 19 federal legal theory upon which the claim is based. *Kelly v. Small*, 315 F.3d 1063, 1066
 20 (9th Cir. 2003), *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir.
 21 2007). The prisoner must have “characterized the claims he raised in state
 22 proceedings *specifically* as federal claims.” *Lyons v. Crawford*, 232 F.3d 666, 670 (9th
 23 Cir. 2000), *amended and superseded on other grounds*, 247 F.3d 904 (9th Cir. 2001). “If a
 24 [prisoner] fails to alert the state court to the fact that he is raising a federal constitutional
 25 claim, his federal claim is unexhausted regardless of its similarity to the issues raised in
 26 state court.” *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996). “Moreover, general
 27 appeals to broad constitutional principles, such as due process, equal protection, and the
 28 right to a fair trial, are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195 F.3d

1 1098, 1106 (9th Cir. 1999).

2 However, “[a] habeas petitioner who [fails to properly exhaust] his federal claims
3 in state court meets the technical requirements for exhaustion” if there are no state remedies
4 still available to the petitioner. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). “This is
5 often referred to as ‘technical’ exhaustion because although the claim was not actually
6 exhausted in state court, the petitioner no longer has an available state remedy.” *Thomas*
7 *v. Schriro*, No. CIV 07-178-TUC-CKJ, 2009 WL 775417, at *4 (D. Ariz. Mar. 23, 2009).
8 If no state remedies are currently available, a claim is technically exhausted and
9 procedurally defaulted. *Garcia v. Ryan*, No. CV-12-01310-PHX-SRB, 2013 WL 4714370,
10 at *8 (D. Ariz. Aug. 29, 2013).

11 Procedural Default Doctrine

12 Federal courts “will not review a question of federal law decided by a state court if
13 the decision of that court rests on a state law ground that is independent of the federal
14 question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729
15 (1991). “This rule applies whether the state law ground is substantive or procedural.” *Id.*
16 To be independent, the state law ground must not be interwoven with federal law.
17 *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). “A state law ground is so interwoven
18 if the state has made application of the procedural bar depend on an antecedent ruling on
19 federal law such as the determination of whether federal constitutional error has been
20 committed.” *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000) (cleaned up). To be
21 adequate, the state law ground must be strictly or regularly followed and “consistently
22 applied.” *Morales v. Calderon*, 85 F.3d 1387, 1390-92 (9th Cir. 1996). “[U]nless the state
23 court makes clear that it is resting its decision denying relief on an independent and
24 adequate state ground, it is presumed that the state denial was based at least in part upon
25 federal grounds, and the petitioner may seek relief in federal court.” *Siripongs v. Calderon*,
26 35 F.3d 1308, 1317 (9th Cir. 1994).

27 Procedural default may be excused under limited circumstances. *Coleman*, 501 U.S.
28 at 750. “When a state prisoner has defaulted his federal claims in state court pursuant to

1 an independent and adequate [state law ground], federal habeas review of the claims is
 2 barred unless the prisoner can demonstrate cause for the default and actual prejudice as a
 3 result of the alleged violation of federal law, or demonstrate that failure to consider the
 4 claims will result in a fundamental miscarriage of justice.” *Clark v. Chappell*, 936 F.3d
 5 944, 966 (9th Cir. 2019) (quotation marks and citation omitted). Cause requires showing
 6 “that some objective factor external to the defense impeded counsel's efforts to comply
 7 with the State's procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Prejudice
 8 requires “showing, not merely that the errors at his trial created a *possibility* of prejudice,
 9 but that they worked to his *actual* and substantial disadvantage, infecting his entire trial
 10 with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982).
 11 The Court need not examine the existence of prejudice if the petitioner fails to establish
 12 cause. *Thomas v. Lewis*, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991). A fundamental
 13 miscarriage of justice requires showing “that a constitutional violation has probably
 14 resulted in [a] conviction when [the petitioner] was actually innocent of the offense. *Cook*
 15 *v. Shiro*, 538 F.3d 1000, 1028 (9th Cir. 2008) (quotation marks and citation omitted).

16 DISCUSSION

17 Appolon files his Objection to the R&R arguing, inter alia, that the grounds on
 18 which the state courts relied to deny his PCR Petition and PFR were unreasonable and
 19 contrary to the Supreme Court’s interpretation of federal laws. (Doc. 43 at 2) In response,
 20 the State argues that the R&R correctly concluded that all of Appolon’s claims are
 21 procedurally defaulted, and that his arguments fail to undermine the R&R’s conclusions.
 22 (Doc. 44 at 1) Upon thorough review of the docket, the Court adopts the R&R, finds that
 23 all of Appolon’s claims are procedurally barred, and dismisses his 2254 Petition in its
 24 entirety. The Court addresses Appolon’s objections to the R&R in seriatim.³

25 I. Ground One: Subject Matter Jurisdiction

26 In his 2254 Petition, Appolon asserted that the superior court was without subject-

28 ³ Appolon withdraws his third ground for relief, stating, “I’ll ask this court to dismiss
 ground three, and grant habeas review for ground 1, 2, and 4[.]” (Doc. 43 at 15)

1 matter jurisdiction over his criminal case to lawfully render judgment and impose sentence.
 2 (Doc. 32 at 6) Appolon argued, in part:

3 The indictment for the two counts read “On or about the 27th day of April,
 4 2005 [sic], Esterlin Appolon assaulted [victim], causing serious physical
 5 injury, in violation of A.R.S. § 13-1204 (A)(1)”; and, “On or about the 27th
 6 day of April, 2015, Esterlin Appolon assaulted [victim] wit [sic] deadly
 7 weapon or dangerous instrument to wit: A Firearm, in violation of A.R.S. §
 8 13-1204(A)(2).” There wasn’t any pretrial statement made by me of guilt or
 9 mea [sic] rea prove [sic] by the State in trial. There was no witness to the
 10 crime present at my trial, the victim said he never seen [sic] who shot him.
 11 The victim said he didn’t want to get the police involved or them knowing
 12 who the person was that shot him. There was no proof or evidence that
 13 violation of A.R.S. § 13-1204(A)(1) or A.R.S. § 13-1204(A)(1) [sic] had
 14 been committed at my trial or before my trial. I have been tried 3 times for a
 15 crime I had any knowledge been committed. On the face of the indictment
 16 presented at my 3rd trial[,] the Court was without jurisdiction to render
 17 judgment or impose sentence. The Superior Court didn’t have jurisdiction of
 18 the class offense.

14 *Id.*

15 Appolon raised the same argument in his PCR Petition. *See* Doc. 35-1 at 77-80. He
 16 argued:

17 In my 3rd trial in the Superior Court the indictment for the two counts read
 18 “On or about the 27th day of April, 2015, Esterlin Appolon assaulted Casi
 19 Brown, causing serious physical injury, in violation of A.R.S. § 13-
 20 1204(A)(1),” and “On or about the 27th day of April 2015, Esterlin Appolon
 21 assaulted Casi Brown with deadly weapon or dangerous instrument, to wit:
 22 a Firearm, in violation of A.R.S. § 13-1204(A)(2) . . . There wasn’t any
 23 pretrial statement made by me of guilt or mens rea prove by the State . . .
 24 There was no witness to the crime present at my trial; the victim said he never
 25 seen who shot him. The victim said he didn’t want to get the police involved
 26 or them know who the person was that shot him On the face of the
 27 indictment presented at my 3rd trial the Superior Court was without
 28 jurisdiction to render judgment or impose sentence.

26 *Id.* at 78.

27 In denying Appolon’s challenge to the jurisdiction of the trial court, the Pima
 28 County Superior Court concluded that:

1 The Superior Court has original jurisdiction over all felony cases as provided
2 by Article 6, Section 14 of the Arizona Constitution.

3 Doc. 35-1 at 137. The court also concluded that Appolon's jurisdictional challenge was
4 meritless if it was based on his contention that he was deprived of counsel at sentencing.
5 *Id.* at 138. It held:

6
7 A review of the transcripts from the hearings on September 1 and September
8 18, 2017, as well as the transcript from the January 30, 2018 sentencing,
9 unequivocally dispels this claim. The Court took great pains to ensure the
10 defendant made a knowing, intelligent and voluntary decision to forego the
11 assistance of counsel and represent himself at the priors trial and sentencing.
12 Additionally, over defendant's objection, the Court appointed advisory
13 counsel who remained available to assist defendant from entry of the verdict
14 up to imposition of sentence. Advisory counsel took an active role during
15 these hearings, including but not limited to assisting defendant during the
16 priors trial and speaking on his behalf at time of sentencing.

17 *Id.*

18 Appolon then repeated the same arguments in his PFR, this time couching his
19 challenge in terms of an "abuse of discretion," e.g., "[d]id trial court abuse it's [sic]
20 discretion by rendering judgment and imposing sentence without jurisdiction or sufficient
21 evidence, in light of due process of law of both U.S. Const [sic] and Ariz [sic] Const [sic],
22 and fundamental fairness?" (Doc. 35-1 at 153)

23 In affirming the Superior Court's denial of Appolon's jurisdictional challenge, the
24 Arizona Court of Appeals ruled:

25 Turning next to Appolon's claim that the superior court lacked jurisdiction,
26 it appears to be based on his lack of counsel at sentencing . . . First, we fail
27 to see how this claim is one of jurisdiction; instead, Appolon's argument
28 seems to be that his sentences were imposed in violation of the state and
federal constitutions under Rule 32.1(a). Second, even if jurisdictional, the
issue seems to be one of personal jurisdiction.

Even assuming the claim were one of subject-matter jurisdiction under Rule
32.1(b), the record belies Appolon's argument concerning his waiver of
counsel. Before granting Appolon's request to proceed pro se, the superior
court engaged in a lengthy colloquy with Appolon to confirm that he was

1 knowingly, intelligently, and voluntarily waiving the right to counsel.
2 Despite the court's warnings against self-representation, Appolon confirmed
3 multiple times during two different hearings that he wished to "give up [his]
4 right to counsel and represent [himself]." The court therefore did not err in
5 finding this claim not colorable.

6 *Appolon*, 2020 WL 1079183, at *3 (internal citations omitted). Notably, the Arizona Court
7 of Appeals also denied Appolon's challenge to superior court jurisdiction on procedural
8 grounds. *See id.* at *2, n.3. It observed:

9 To the extent Appolon's challenge is directed at the sufficiency of the
10 indictment, it is also precluded pursuant to Rule 32.2(a)(3). Challenges to an
11 indictment must be raised before trial.

12 *Appolon*, 2020 WL 1079183, at *2, n.3 (citations omitted).

13 The Magistrate Judge concluded that Appolon's challenge to the superior court's
14 jurisdiction was procedurally defaulted because the "Arizona Constitution's grant of
15 jurisdiction to the superior court is an independent and adequate state ground," which
16 precludes this Court from review of the claim. (Doc. 36 at 23) The Court supplements this
17 conclusion by finding that Appolon's challenge is also barred due to the Arizona Court of
18 Appeals' invocation of Arizona Rule of Criminal Procedure 32.2, which serves as an
19 adequate and independent state procedural rule barring review. *Cf. Carriger v. Lewis*, 971
20 F.2d 329, 333 (9th Cir. 1992) ("A state supreme court may . . . alternatively deny relief on
21 the merits of a federal constitutional claim even after dismissing the claim on procedural
22 grounds."); *see also Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014) ("Arizona's waiver
23 rules are independent and adequate bases for denying relief.").

24 The Court also finds that Appolon fails to demonstrate cause for his procedural
25 default or that failure to consider his jurisdictional challenge will result in a fundamental
26 miscarriage of justice. In his R&R, the Magistrate Judge concluded that "[n]either has
27 Petitioner established by clear and convincing evidence that but for the constitutional error,
28 no reasonable factfinder would have found him guilty of the underlying offense," nor has
he "demonstrated a fundamental miscarriage of justice." (Doc. 36 at 24) (cleaned up). The

1 Court agrees. Appolon's non-sequitur, rambling, and incoherent arguments to the contrary
 2 fail to convince the Court otherwise. *See generally*, Doc. 43 at 4-10. Accordingly, the
 3 Court adopts the Magistrate Judge's R&R on the issue and denies this claim.

4 **II. Ground Two: Sufficiency of Evidence**

5 In his 2254 Petition, Appolon asserted that there was insufficient evidence to justify
 6 a rational trier of fact finding guilt beyond a reasonable doubt for charges of aggravated
 7 assault. (Doc. 32 at 7) Appolon argued, in part:

8 No confession of guilt was given by me at trial or at all. Quoting my 3rd trial:
 9 The Court: "Mr. Appolon, at this time are you going to invoke your Fifth
 10 Amendment rights?" And I stated yes, sir. No gun, DNA, or other
 11 incriminating evidence such as bloody clothing was found or presented at
 12 trial. Mr. Brown (victim) claimed he owed me money he testified that I never
 13 nagged him for it the night he claimed I shot him, he also testified I didn't
 14 threaten him and/or he said he didn't feel in danger the night of the shooting.
 15 Mr. Brown misidentify me in my trial proceeding, he testify that he know me
 for yrs, but fail to I.d. me with my tattoo's on my arms and neck. At trial Mr.
 Brown denied saying "it wasn't Stan" who shot him but then acknowledged
 that he did so because he didn't want police involved.

16 *Id.*

17 Appolon raised a similar argument in his PCR Petition. *See* Doc. 35-1 at 75. He
 18 argued, in part:

19 [T]he State didn't prove the essential elements of the two counts, nor prove
 20 mens rea of the two counts. [No confession of guilt was given by me at trial
 21 or at all, and/or pretrial.] "The Court: Mr. Appolon, at this time are you going
 22 to invoke your Fifth Amendment rights?" "Mr. Appolon Yes, sir." No gun,
 23 DNA, or other incriminating evidence such as bloody clothing was found or
 24 presented at trial. Mr. Brown claimed he owed me money he testified that I
 25 never nagged him for it and the night he claimed I shot him, Mr. Brown
 26 testified I did not threaten him, and he did not feel in any danger and I was
 27 friendly on the night he claimed I shot him. Mr. Brown misidentify me in my
 28 trial proceedings and pretrial statements as he stated and testify that he know
 me for yrs, but fail to I.d. with my tattoo's on my arms and neck. At trial Mr.
 Brown denied saying "it wasn't Stan" who shot him but then acknowledged
 that he did so because he didn't want the police involved.

1 *Id.* (internal citations omitted).

2 In denying Appolon's challenge to the sufficiency of evidence presented at trial, the
3 Superior Court concluded that:

4 At trial, the State presented the following evidence: 1. Testimony from the
5 victim that identified defendant as the person who shot him in the face. 2.
6 Testimony from the victim that he knew the defendant for a relatively long
7 period of time and had no trouble identifying him. 3. Testimony from a
8 civilian witness who identified defendant as being at the shooting scene
9 shortly before the shooting occurred. 4. Testimony/evidence showing the
location of a cell phone that was linked to the defendant which put him in
close proximity to the shooting scene at the time of the shooting.

10 Upon consideration, the Court concludes that defendant has not carried the
11 burden of presenting clear and convincing evidence to support the
12 proposition that no reasonable factfinder would have been able to find him
13 guilty of two counts of aggravated assault beyond a reasonable doubt. At
14 trial, the jury was required to weigh the evidence, both direct and
15 circumstantial, and make credibility determinations regarding witness
16 testimony. Defendant's critique of the State's evidence notwithstanding, a
17 reasonable jury could have readily concluded Mr. Brown's testimony that
18 defendant shot him in the fact was credible, especially with the corroborating
evidence provided by the independent civilian witness and the cell phone
tracking evidence. As with the jurisdiction argument, defendant has failed to
present a colorable claim to warrant an evidentiary hearing on his sufficiency
of evidence claim or obtain relief pursuant to Rule 32.1.

19 (Doc. 35-1 at 139-40)

20 Appolon then repeated the same arguments in his PFR, this time couching his
21 challenge in terms of an "abuse of discretion," e.g., "[d]id the State have sufficient evidence
22 to justify a rational trier of facts [sic] to find guilt beyond a reasonable doubt of [aggravated
23 assault charges] under *Jackson v. Virginia* 493 U.S. 300; and *State v. Mathers*, 165 Ariz?"

24 (Doc. 35-1 at 153)

25 In affirming the Superior Court's denial of Appolon's sufficiency of the evidence
26 challenge, the Arizona Court of Appeals ruled:

1 Finally, as to Appolon's claim that the state presented "[in]sufficient
2 evidence to justify a rational trier of facts to find guilt beyond a reasonable
3 doubt," he asserts "[n]o gun, DNA, or other incriminating evidence such as
4 bloody clothing was found or presented at trial." But a general challenge to
5 the sufficiency of the evidence does not, without more, constitute a viable
6 claim under Rule 32.1(h). Appolon points to evidence that does nothing more
7 than contradict other evidence presented at trial, including the victim's
8 identification of him as the shooter, apparently challenging the weight
9 thereof. He thus "does not conclusively demonstrate his innocence." The trial
10 court therefore did not err in finding this claim not colorable.

11 *Appolon*, 2020 WL 1079183, at *3 (internal citations omitted).

12 The Magistrate Judge concluded that Appolon's sufficiency of the evidence
13 challenge was procedurally defaulted, as "[b]oth the Rule 32 court and the appellate court
14 relied on the standards set forth in Rule 32.1(h), Arizona Rules of Criminal Procedure, to
15 assess Petitioner's sufficiency of the evidence claim[.]" and that their rulings indicated
16 resolution of Appolon's challenge on "independent and adequate state grounds." (Doc. 36
17 at 25) The Court agrees with this conclusion.

18 "The question whether a state court's reference to state law constitutes an adequate
19 and independent state ground for its judgment may be rendered difficult by ambiguity in
20 the state court's opinion." *Harris v. Reed*, 489 U.S. 255, 261 (1989). However, if the state
21 court's opinion contains a "plain statement that its decision rests upon adequate and
22 independent state grounds" the court may not reach the federal question upon habeas
23 review. *Id.*; see also *Long*, 463 U.S. at 1041 ("If the state court decision indicates clearly
24 and expressly that it is alternatively based on bona fide separate, adequate, and independent
25 grounds, we, of course, will not undertake to review the decision."). Here, thorough
26 decisions based upon Arizona Rule of Criminal Procedure 32.1(h) are adequate and
27 independent state law grounds that serve to bar the Court from reviewing Appolon's
28 sufficiency of the evidence challenge.

The Court also concludes, once again, that Appolon fails to demonstrate cause for
the procedural default or that failure to consider his evidentiary challenge will result in a
fundamental miscarriage of justice. The Magistrate Judge concluded that "Petitioner has

1 failed to show cause and actual prejudice or demonstrate a fundamental miscarriage of
 2 justice.” (Doc. 36 at 26) The Court agrees. Appolon fails to provide any supporting
 3 caselaw or argumentation for the Court to rule otherwise. *See* Doc. 43 at 10-15.
 4 Accordingly, the Court adopts the Magistrate Judge’s R&R on the issue and denies this
 5 claim.

6 **III. Ground Four: Prosecutorial Misconduct**

7 In his 2254 Petition, Appolon asserted that the State engaged in prosecutorial
 8 misconduct by presenting a responding officer’s body camera footage from the night of the
 9 shooting at his third jury trial, which it had not presented at either of his two previous trials.
 10 (Doc. 32 at 10) He argued, in part:

11 The State at a hear on July 17, 2017 state “[t]here wouldn’t be any difference
 12 or any additional witnesses called in fact, I’ll be cutting my witness list down
 13 from the previous trial.” The State lied it present a body cam video that
 14 wasn’t in my 1st or 2nd trial but used this body cam in my 3rd trial. I filed a
 15 month for all bodycam, the State reply saying that no body cam was
 16 available. The State and its agents withheld evidence from my 1st and 2nd
 17 trials. After I learned of the full body cam of officer’s video in which was
 18 after I was found guilty. The video was highly exculpatory and
 19 impeachable[.]

20 *Id.*

21 Appolon failed to raise this issue in his PCR Petition. *See generally*, Doc. 35-1 at
 22 74-81. However, he did raise the issue in his PFR with the Arizona Court of Appeals,
 23 interweaving his challenge under the question, “[d]id trial court deny me fair and impartial
 24 treatment in ordinance [sic] of fundamental fairness?” Doc. 35-1 at 153. Appolon argued,
 25 in part:

26 Trial court in its “procedural facts” quoting trial: “The Court made no finding
 27 as to whether the body camera video contained any pertinent information or
 28 that trial counsel’s failure to fully review it.” Trial court error in its finding
 the body cam was product of prosecutorial misconduct. The State and its
 agents withheld evidence knowingly from my 1st, 2nd, and 3rd trials. After
 I learned of the full body cam of officer’s body cam video, in which was after
 I was found guilty. The video was highly exculpatory[.]

1 *Id.* at 161 (internal citation omitted).

2 The Arizona Court of Appeals did not address this argument, *see Appolon*, 2020
3 WL 1079183, at *1-3, and the Magistrate Judge concluded that Appolon’s claim was
4 “technically exhausted and procedurally defaulted.” (Doc. 36 at 28) (quotation marks
5 omitted). The Court agrees. Although Appolon uses language found in both his PFR and
6 2254 Petition, his prosecutorial misconduct claim was not raised with the Superior Court,
7 and he failed to describe the operative facts and federal legal theory upon which the claim
8 was based with the Arizona Court of Appeals. Because Appolon failed to present the issue
9 to the state’s highest court in a procedurally appropriate manner and since he no longer has
10 any state remedies available to him, this ground for relief is technically exhausted and
11 procedurally barred. The Court notes that even in the absence of procedural default, his
12 prosecutorial misconduct claim lacks merit. An affidavit from his trial attorney
13 demonstrates that the video was produced to the defense in a timely manner, *see* Doc. 43-
14 11, ¶ 7 at 3, and upon independent review of the body camera footage,⁴ the Court concludes
15 that the evidence fails to contain any exculpatory information. Accordingly, the Court
16 adopts the conclusion of the R&R and this claim is denied.

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⁴ The Court reviewed body camera footage upon Petitioner’s request. *See* Doc. 48.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases, requires that the “district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Such certificates are required in cases concerning detention arising “out of process issued by a State court[,]” or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a state court judgment. The Court must determine, therefore, if a certificate of appealability (“COA”) shall issue.

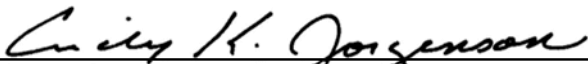
The standard for issuing a COA is whether the applicant has “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* In the certificate, the Court must indicate which specific issues satisfy the showing. 28 U.S.C. § 2253(c)(3).

The Magistrate Judge determined, and this Court accepts, that Petitioner’s claims are procedurally barred. The Court finds that jurists of reason would not find it debatable whether the Third Amended Petition stated a valid claim of the denial of a constitutional right and that jurists of reason would not find it debatable whether the district court was correct in its procedural ruling. A COA shall not issue as to Petitioner's claims. Any further request(s) for a COA must be addressed to the United States Court of Appeals for the Ninth Circuit. *See* Fed. R. App. P. 22(b); Ninth Circuit R. 22-1.

IT IS ORDERED:

1. The Report and Recommendation (Doc. 36) is ADOPTED.
2. Petitioner's Third Amended Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody on the case docket (Doc. 32) is DISMISSED WITH PREJUDICE.
3. A Certificate of Appealability shall not issue in this case.
4. The Clerk of Court shall enter judgment accordingly and close this case.

Dated this 30th day of September, 2021.


Honorable Cindy K. Jorgenson
United States District Judge